In *Ace King Pte. Ltd.v.Circus Americano Ltd. & Ors*. [1985] 2 MLJ 75, it was decided that from the evidence the parties had concluded their negotiations and an agreement had been reached on the same terms and conditions of the contract. The only thing that had not been done was the signing of the contract which had been prepared by the lawyer. In the circumstances, the Court was of the view that the contract had been concluded between the plaintiffs and the defendants.

In **Chitty on Contracts** at pp. 33 and 34 it is stated that:

> An acceptance is a final and unqualified expression of assent to the terms of an offer..... Negotiations with a view to contracting may be long and complicated; and in such cases it may be hard to tell when if at all an offer has been made and accepted. The Court then has to look at whole course of the negotiations and to determine at what point of any the parties reached agreement. The parties may of course continue their negotiations after this point has been reached; but this fact will not affect the existence of the contract between them unless the continuing negotiations can be regarded as an agreement to rescind the original contract ... Where an offer or an acceptance or both are alleged to have been made by conduct, the terms of the agreement are obviously more difficult to ascertain than where the agreement was negotiated by express words. The difficulty may be so great as to force the court to conclude that no agreement was reached at all. But sometimes the Court can resolve the uncertainty by applying the standard of resonableness or by reference to another contract between the parties, or even to a draft agreement between them which had never matured into a contract.

On the facts and the authorities cited before me, it was my view that a contract had been concluded between the parties even though the written agreement had yet to be signed by the defendant. The acceptance by the defendant of the plaintiff's letter of offer dated 13 January 1992 had resulted in a legally binding and enforceable contract between the parties and the payment of ten per cent by the defendant on 3 April 1992 had in fact strengthened this fact. As such, it was my finding that the defendant was liable for the breach by failing to continue with the agreement. I had therefore granted the orders as prayed by the plaintiff.

SYARIKAT PERIKANAN HING LEE (SABAH) SDN. BHD.

v.

ANSARI ABDULLAH (PRACTISING UNDER THE NAME AND STYLE OF ANSARI & CO.)

HIGH COURT BORNEO, KOTA KINABALU
DATO' SYED AHMAD IDID J.
[CIVIL SUIT NO. K.1680 OF 1986]
2 APRIL 1993

PRACTICE & PROCEDURE: Order 18 r. 19 RHC - Application to strike out defence - Defendant appointed by plaintiffs as solicitors - Plaintiffs alleging breach of contract upon a retainer and/or negligence as stakeholder - Defendant denying retainer and solicitor-client relationship - Whether any merit in the defence.

LEGAL PROFESSION: Solicitor and client - Plaintiffs lending money to borrower on security of land titles - Defendant retained by plaintiffs as solicitors - Defendant to hold loan as stakeholder - Defendant releasing loan to borrower without ensuring registration of charges on titles - Plaintiffs alleging breach of contract upon retainer and/or negligence as stakeholder - Defendant denying existence of solicitor-client relationship - Whether any relationship existed - Whether there was a retainer.

TORT: Professional negligence - Defendant retained as solicitors - Defendant to hold loan from plaintiffs to borrower as stakeholder - Defendant to register charges on titles of land provided by borrower as security for the loan - Defendant releasing loan without registering charges - Whether defendant breached duty of care.

This was an application by the plaintiffs to strike out the defendant's defence under O. 18 r. 19 of the Rules of the High Court 1980 (RHC) or under the inherent jurisdiction of the Court.

The plaintiffs, licenced moneylenders, extended a loan to the borrower on the security of the borrower's lands which was to be charged in favour of the plaintiffs. By letter dated 15 December 1983 the plaintiffs instructed the defendant, a firm of solicitors, to process the necessary documents and to release the loan only upon full satisfaction that the loan was secured. The defendant and one Chew Tee Wah was also to sign a letter of guarantee. The loan of RM300,000 was subsequently received by the defendant as stakeholder and released to the borrower but upon a land search being conducted it was revealed that no charges had been

registered on the 17 titles. The plaintiffs issued a claim against the defendant for damages for breach of contract upon a retainer and/or negligence. In his defence the defendant denied the plaintiffs were his client and claimed that the plaintiffs had misrepresented that they were moneylenders. He further contended that as the letter of guarantee was signed by Chew Tee Wah who was not a partner nor staff of the firm, this showed consent to be guarantors but not solicitors.

Held:

[1] With respect to the non-registration of charges on the titles, the defendant explained that one of the 17 titles was a lease which had expired whilst the rest were native titles and only one was acceptable for registration. As he failed to register it, he claimed that the loss was only to the value of 10 acres of land. The Court found that this was not a sound answer to the demands of the plaintiffs because it was the defendant's own inactivity which held him back from either confirming with the plaintiffs that the charges on the titles could not be registered or from refunding the loan.

[2] While the defendant denied that the plaintifs were his client, he nevertheless accepted the RM300,00 which his firm received and released to the borrower. By paragragh 6 of the defendant's affidavit affirmed on 13 January 1988 he said that; "damages must be proved and are only limited to the pecuniary loss sustained." Such a response went to show that the defendant agreed his firm was involved as solicitors. The plaintiffs would not have sent the RM300,000 to the defendant if he were merely acting as guarantor. Furthermore the plaintiffs were able to prove that they were licensed moneylenders at the material time.

[3] Was the letter of 15 December sufficient to ground a solicitor-client relationship? According to *Yong & Co. v. Wee Hood Teck Development Corporation* [1984] 2 MLJ 39 (FC) it would appear that letters from a firm of solicitors can give rise to a course of dealings leading to legal obligations which in turn establish the relationship of solicitor and client. Letters to legal firms may do the same. The Federal Court also held that the position of the solicitor's duties were confined to the retainer.

[4] Was there a retainer? In the instant case, it was clearly borne out that the plaintiffs instructed the defendant as solicitors. Secondly, as the plaintiffs paid the firm the RM300,000 which the defendant in turn paid to the borrower, it was discernible that the defendant was acting as solicitors cum stakeholders, in which case the retainer must be presumed. On the totality of the evidence the Court was unable to see any merits in the defence and accordingly granted order in terms of the plaintiffs' application with costs.

[Plaintiffs' application allowed with costs].

Cases referred to:

Pinekey v. Bagnal [1723] 3 KB 155 ***(cit)***
Horsley & Ors. v. Maclaren & Ors. [1971] 2 Lloyds LR ***(dist)***
Medlicott v. Emery [1933] 149 LT 303 ***(refd)***
Yong & Co. v. Wee Hood Teck Development Corporation [1984] 2 MLJ 39 ***(foll)***
T. Damodaran v. Choe Kuan Him [1979] 2 MLJ 267 ***(foll)***
Sorreil v. Finch [1976] 2 All ER 371 ***(refd)***
Skinner v. Trustee of the Property of Reed [1976] 2 All ER 1286 ***(cit)***
Kuldip Singh & Anor. v. Lembaga Letrik Negara & Anor. [1983] 1 MLJ 256 ***(cit)***
Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp [1978] 3 All ER 571 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19, O. 41 r. 1(4)

For the plaintiffs - David D.W. Wong; M/s. Peter Lo & Co.
For the defendant - Ansari Abdullah Ali; M/s. Ansari & Co.

JUDGMENT

Syed Ahmad Idid J:

The plaintiffs, way back on 8 December 1986, had claimed for damages, costs and such other relief in connection with the RM300,000 loan which the defendant had disbursed to Amin bin Jahali and the non-registration of charges thereto. The letter of guarantee (LOG) dated 15 December 1983 bears the signatures of (1) the defendant; and (2) Chew Tee Wah. Amin and both signatories to the LOG have been made defendants in Suit K.266/85 wherein judgment was entered against Amin and Chew in default of their appearance. Ansari (defendant in that case as well as here) filed his defence but the trial which was supposed to have been arranged (in that action) is yet to be fixed.

The Court confines itself today to the plaintiffs' application to strike out the whole of the defence

under O. 18 r. 19 of the Rules of the High Court 1980 or alternatively under the Court's inherent jurisdiction. The causes of action in the plaintiffs' case are based on (i) breach of contract upon a retainer; and/or (ii) negligence in the defendant's duty of care as stakeholder to the plaintiffs (tort).

The Facts:

On or about 15 December 1983, the plaintiffs' representative met the defendant. While the plaintiffs claim that this was "consultation for professional advice", the defendant says this was only "to discuss on loan to Amin." I accept the plaintiffs' version as it is not normal for a moneylender to meet any other who is not the customer or borrower to discuss the loan.

The plaintiffs then wrote an instructional letter dated 15 December 1983 to "Ansari & Co." wherein:

(a) both Encik Ansari Abdullah and Encik Chew Tee Wah signed as "guarantors" in their personal capacity. Amin in his affidavit affirmed on 14 November 1992 states that he approached Ansari and "requested him to be my guarantor". See also TKY-7 which is the subject matter in K.266/85 and so I shall say no more on it.

(b) the Director of the plaintiffs specified that:

(i) the firm "Messrs. Ansari" are liable as solicitors and therefore it was requested to process all documents:

(ii) the loan was to be released to the legal firm "Ansari & Co." (and this was accordingly done); and

(iii) the firm was only to release the money to the borrower (Amin bin Jahali) "upon your (i.e. firm of Ansari & Co.) full satisfaction that it is safe for you to release the money, i.e. including the safe security and mortgage of 17 (PLs and NTs) titles in Ranau.

A search conducted at the relevant land office revealed that none of the 17 titles had been registered as charges. The defendant explains that PL.066290060, a lease, had expired on 31 December 1975 while the others were native titles. Defendant admits that only PL.066184996 was acceptable for registration and as he did not register it, he claims that the loss was only on the value of the 10 acres of land. Such claim by the defendant is not a sound answer to the demands of the plaintiffs because it was defendant's own inactivity which held him back from either confirming to plaintiffs in time that the titles could not be registered or from refunding the loan.

While the defendant denies that plaintiffs were his client, he nevertheless accepted the RM300,000 which his firm received and he then paid it out to Amin. By Para 6 of defendant's affidavit affirmed on 13 January 1988 he says that "damages must be proved and are only limited to the pecuniary loss sustained." Such a response goes to show that the defendant agrees that his firm was involved as solicitors. The plaintiffs would not have sent the RM300,000 to the defendant if the defendant merely acted as a guarantor.

The plaintiffs, according to the TKY-4, were moneylenders (see Majlis Perbandaran Sandakan's Licence No: ML0015) from 2 April 1986 to 31 December 1986. Another licence dated 6 January 1983 was issued to the plaintiffs enabling them to carry on the business of moneylending for period from 5 January 1983. See DW-1. The defendant's defence, filed on 16 March 1987, states that the plaintiffs had misrepresented that they were moneylenders. As it turns out, the plaintiffs were able to prove they were licensed as such at the material time.

Some unsatisfactory features of this case can be seen from the affidavits of Chew Tee Wah (i) affirmed on 1 March 1988, attested by Gerard Math which he now denies in his (ii) affidavit affirmed on 16 November 1992. Both affidavits do not provide Chew's residential address as required by O. 41, r. 1(4) of the Rules of High Court 1980. In the latter affidavit, he "categorically" says that he had never sworn the March 1 affidavit. Amin bin Jahali also supplied an affidavit affirmed on 14 November 1992 in which he says that "Chew Tee Wah was hand in glove with Mr. Tan Koon Yee". Mr. Tan Koon Yee affirmed two affidavits on 22 April 1987 and 31 July 1992. It is also noted that the affidavits dated 14 and 16 November 1992 by Amin bin Jahali and Chew Tee Wah have been attested by Commissioner for Oaths No. 469, Datuk Ahmad J. Read, who also attested the statutory declaration by Chew Tee Wah on 13 November 1992 which again has not provided for any residential address. Upon reading these affidavits, I have decided that they do not materially affect the outcome of the decision that I have to make.

The letter TKY-2 was signed by Chew Tee Wah who the defendant claims "was not a partner or member of the staff of Ansari & Co." And so, according to the defendant, this shows that the signatures therein signify consent to be guarantors but not as solicitors. But why was it arranged for the sum of RM300,000 to be received by the firm (or defendant) if he was merely a guarantor? It is not usual for any loan to be sent to a guarantor. The normal course, as here, is for the financier to send the sum of money to a law firm for its onward disbursement when all documents and other security control are completed as they should be.

I have treated the denial of the solicitor-client relationship as an important aspect. Was there such a relationship? Was there a contract? Is the letter of 15 December 1983 sufficient to ground a solicitor-client relationship? Exhibit TKY-2 is clear on this. The defendant was instructed to charge those titles and to have found out if all or any of those titles could be charged. The money was released to the defendant as stakeholder and, as this was so, defendant was therefore acting or he accepted to act as solicitors. See *Pinekey v. Bagnal* [1723] 3 KB 155. We can distinguish the case of *Horsley & Ors. v. Maclaren & Ors.* [1971] 2 Lloyds LR. The judgment in *Medlicott v. Emery* [1933] 149 LT 303 confines the business to the purpose of the retainer. See TKY-6. By *Yong & Co. v. Wee Hood Teck Development Corporation* [1984] 2 MLJ 39 (FC) and *T. Damodaran v. Choe Kuan Him* [1979] 2 MLJ 267 (PC) it would appear that letters from a firm of solicitors can give rise to a course of dealings leading to legal obligations which in turn establishes the relationship of solicitor and client. Letters to legal firms may do the same. In *Yong's (supra),* the Federal Court held that the position of solicitor's duties are confined to the retainer.

Lord Denning in *Sorreil v. Finch* [1976] 2 All ER 371 defined the duties of an estate agent as stakeholder (at p. 376) and the stakeholder holds it *in medio* pending the outcome of a future event and while he holds the money, he is trustee of both parties. See *Skinner v. Trustee of the Property of Reed* [1976] 2 All ER 1286. Lord Denning's view was a dissenting Court of Appeal decision but it was later upheld by the House of Lords on further appeal. This view was applied in *Kuldip Singh & Anor. v. Lembaga Letrik Negara & Anor.* [1983] 1 MLJ 256.

Was there a retainer? Should there be proof of a retainer? In *Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp* [1978] 3 All ER 571, at p. 578 it was held that:

> a retainer will be presumed if the conduct of the parties shows that the relationship of solicitor and client has in fact been established between them.

In our instant case, it was clearly borne out that the plaintiffs instructed the defendant as solicitors. Secondly, as the plaintiffs paid in to the firm the sum of RM300,000 which in turn the defendant paid out to Amin, it is discernable that the defendant was acting as solicitors cum stakeholder, in which case the retainer must be presumed.

In order to adequately deal with the matter from the evidential angle, I have re-looked at the defence. The questions of the meeting and its purpose and the licensing of plaintiffs have been clearly explained and answered. I have also touched on the doubts regarding the retainer and the existence or otherwise of the solicitor-client relationship. On the totality of the evidence and taking into account the various factors which the defendant has put in, including the extraneous "opposition submission to reply" (which the Counsel for the plaintiffs has termed "highly improper"), I am unable to see any merits of the defence. Accordingly, I grant the order in terms of the plaintiffs' application, with costs.